



Winter Edition

December 2018

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From the Desk of Bill Jennings

Mischief is afoot, chaos reigns. The threads of Jerry Brown's grandiose legacy project to siphon Sacramento River water under the Delta for shipment to southern California are converging in the waning days of his administration. With tunnel skeptic Gavin Newsom scheduled to take office on 7 January, Brown is increasing pressure on state agencies to expedite regulatory approvals for the California WaterFix tunnels.



This edition looks at recent developments in the State Water Board's evidentiary water rights hearing on WaterFix, the Phase 1 revisions to the water quality control plan for the Bay/Delta and the Delta Stewardship Council hearing to determine whether or not WaterFix complies with the Council's Delta Plan. Add in the Trump administration's war on environmental regulations protecting the Delta and California's water rights authority and we have, perhaps, the most turbulent period in fisheries protection over the last fifty years.

The State Water Board has scheduled a hearing on Wednesday 12 December to consider whether to adopt staff's recommended revisions to the water quality control plan or accede to the Governor's request to embrace a nebulous voluntary settlement process. The Board must also decide if it is going to schedule a Part 3 of the WaterFix proceeding or move ahead with closing briefs. The Stewardship Council has scheduled a hearing on the Consistency Determination for WaterFix on Thursday 20 December. Staff concluded that WaterFix is not consistent with the Delta Plan and Council members have suggested that the consistency request be withdrawn. We'll see if the Council can withstand last minute pressure.

In Washington, the Trump administration has issued a series of directives to federal agencies to accelerate environmental reviews, reevaluate the operations agreement between the state and federal projects and increase Delta exports. A lame-duck Congress is frantically attempting to pass a series of measures to increase exports and harm fish. These include a 7-year extension of the Water Infrastructure Improvements (WIIN) Act that would facilitate exports and authorize federal funding for dams and WaterFix. Also included are the Calvert, Valadao and Denham Riders to the appropriations bill that would prevent judicial review of WaterFix and the export



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projects and sabotage revisions to the Water Quality Control Plan.

If this December tempest can be weathered, efforts to protect fisheries should emerge in reasonably good shape, given a new Governor, the administrative record in various hearing processes and the suite of present and future litigation.

CSPA is in the trenches fighting for fisheries and water quality in all of these proceedings. Our involvement has depleted our resources: it costs money to fish for fish. As activists, we don't squander limited resources on fluff - it all goes for technical and legal actions. [Please help us continue the fight with a generous donation.](#)

We also invite you to frequently check out our [Fisheries Blog](#) on the current state of fisheries. There's nothing else quite like it.

Delta Stewardship Council Recommends Pause in Delta Tunnels Project

By Chris Shutes

It now appears that there is almost no chance that Delta tunnels will be approved and begin construction before Governor Brown leaves office in January 2019. The roadblock emerged on November 15, 2018 in a proceeding before a state agency that most people don't know about and even fewer understand: the Delta Stewardship Council.



Sacramento-San Joaquin River Delta
Photo Credit: CA State Water Resources Control Board

Following a day-long workshop on November 15, the Chair of the Delta Stewardship Council recommended that the Department of Water Resources (DWR) further define its Delta tunnels ("WaterFix") project before asking the Council to approve the project. Chair Randy Fiorini's comments were supported by comments by Council member Frank Damrell. (See details in [Maven's Notebook](#)).

The Delta Stewardship Council must find that WaterFix is consistent with the Delta Plan before DWR can begin construction of WaterFix facilities. Nine "appellant groups" appealed DWR's July 27, 2018 Certification that WaterFix is consistent with the Delta Plan. CSPA is part of Appellant Group 3, whose appeal was filed by Bob Wright with Friends of the River. (For the Certification, the appeals, and the voluminous 30,000+ document record for the proceeding, see deltacouncil.ca.gov).

The Delta Stewardship Council held a hearing on the appeals on October 24-26, 2018. At hearing, CSPA's Chris Shutes summarized the portion of Group 3's appeal dealing with flow requirements and the incompleteness of DWR's proposed project, and rebutted some of DWR's assertions.

Following the hearing in October, Council staff produced a [Staff Draft Determination](#) that recommended findings of inconsistency with five policies in the Delta Plan. At the Council's workshop on November 15, Staff presented its Draft Determination, and DWR followed with a

presentation of its own. After questions from the Council, Appellant Groups made presentations. On behalf of Group 3, CSPA made a presentation in support of staff's findings of inconsistency and in opposition to issues on which staff recommended denying appeals.

The proceeding before the Stewardship Council is squarely in the critical path of DWR's efforts to construct the Delta tunnels. Nine groups of appellants showed up with well-researched and cogent arguments, and complemented one another well. They have made a difference. Not surprisingly, the nine groups represent most of the entities that have also been in the forefront of opposition in the three-year proceeding on the Delta tunnels before the State Water Resources Control Board.



Lower Tuolumne River at Roberts Ferry Bridge
December 3, 2018

State Water Board Postpones Decision on San Joaquin River Flows

By Chris Shutes

In response to a joint written request [1] from Governor Brown and incoming Governor Gavin Newsom, the State Water Resources Control Board on November 7, 2018 postponed a decision on adoption of increased flow requirements for the lower San Joaquin River. [2] As proposed, the San Joaquin River Flows and Southern Delta Salinity portion of the update of the Bay-Delta Plan would require release of 40% of the unimpaired flow in the Stanislaus, Tuolumne and Merced rivers in the months of February through June.

The update of the Bay-Delta began in 2009. The last update was in 1995. The State Water Board had already postponed a decision on August 22, 2018.

The ostensible reason for the November postponement was to allow additional time for voluntary settlements that would supplant the Board's proposed plan. Such settlements are advocated by most water users in the Bay-Delta watershed, as well as by the California Department of Natural Resources including the Department of Fish and Wildlife. At the November 7 meeting, CSPA advocated adoption as scheduled and strongly opposed postponement, pointing out that proposed settlements would fall far short of the State Water Board's already compromised proposed flows. CSPA also opposed the increasing politicization of the process. Others speaking in opposition of postponement included National Resources Defense Council, the Bay Institute, Golden West Women Flyfishers, and the Tuolumne River Trust.

The State Water Board has now scheduled its adoption hearing for December 12, 2018. CSPA fully expects that state resource agencies and various water users will at that time present the State Water Board with one or more outlines of wholly inadequate proposed settlements.

[1] Letter is posted at:

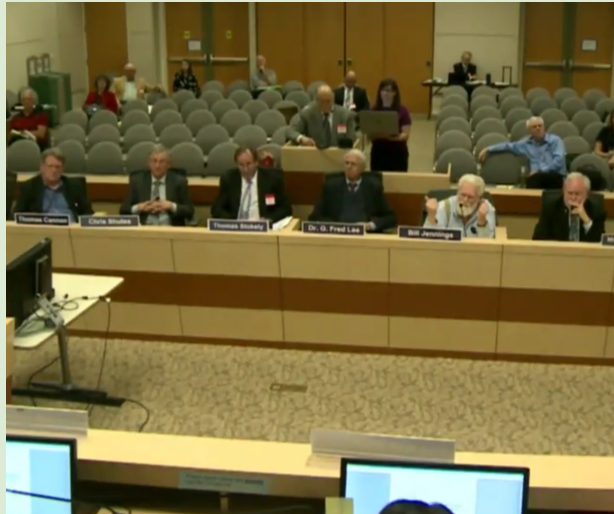


Spawning Chinook Salmon, Lower Tuolumne River
December 3, 2018

https://www.waterboards.ca.gov/docs/20181106_brown_newsom_ltr.pdf

[2] See media advisory at:

https://www.waterboards.ca.gov/press_room/press_releases/2018/pr110718_bay-delta_plan_continuance.pdf



CSPA at State Water Board Hearings in Sacramento, CA

Delta Tunnels Hearing at State Water Board Drawing to a Close

By Chris Shutes

After more than three years, 104 days of testimony, and over twenty-four thousand pages of hearing transcripts, the hearing before the State Water Resources Control Board (State Board) on the proposal to construct two tunnels to convey water under the Delta (aka California WaterFix) is almost completed. Probably, that is: there could be more if the project changes again to a degree that requires additional testimony and/or environmental review.

The hearing before the State Board responds to the August 26, 2015 joint petition of the California Department of Water Resources (DWR) and the U.S. Bureau of Reclamation (Bureau) to add points of diversion to their existing water rights. Adding points of diversion would allow DWR and the Bureau to divert water at three tunnel intakes between Clarksburg and Courtland on the Sacramento River south of Sacramento. From there, water would move in two tunnels under the Delta to a new "forebay" near Tracy, next to the existing Clifton Court Forebay from which DWR draws diverts water from the south Delta. From the new forebay, water would move to DWR and the Bureau's existing pumping plants at the heads of the California Aqueduct and the Delta-Mendota Canal.

In 2015, DWR and the Bureau were adamant that the State Board should schedule and commence a hearing right away. Despite comment letters opposing such hearing on the grounds it was premature, the State Board issued a hearing notice on October 30, 2015. However, CEQA and NEPA environmental review for the "WaterFix" project was still incomplete when the hearing began. Essential elements of the project were unclear. Thus, the State Board's Hearing Officers required DWR and the Bureau to present their first round of written testimony prior to other parties to the proceeding. (*The State Board's web page for the WaterFix water right hearing is [here](#).*)

For CSPA, response began with a water rights protest of the petitions, jointly filed with CSPA's partners throughout the WaterFix hearing, the California Water Impact Network (C-WIN) and AquAlliance. CSPA et al timely filed their joint protest on January 5, 2016, and thus joined many other parties as "protestants" in the proceeding.

After the initial rush to start a hearing, DWR and the Bureau asked for time extensions, and actual hearings did not start until July 2016. As the hearing unfolded over the next two years, DWR and the Bureau continued to change the project description, in some cases making previous testimony obsolete because that testimony addressed older versions of the project. Even after testimony that took place over two years, DWR, on July 17, 2018, released a Supplemental Draft Environmental Impact Report (EIR: CEQA)/Draft Environmental Impact Statement (EIS: NEPA) to analyze additional changes to the project. The Bureau issued a Notice of Availability under NEPA on September 20, 2018. The NEPA comment period closed as recently as November 5, 2018.

A water rights change petition requires the State Board to determine whether the requested change constitutes an application for a new water right. It also requires the State Board to

determine whether the change would "injure" other legal users of water, for example by reducing the quantity of available water or worsening the water quality. The Hearing Officers set these issues up as Part 1 of the hearing. As the owner of a small holding with riparian water rights in Collinsville near the mouth of the Sacramento River in Solano County, CSPA participated in Part 1 of the hearing.

A water rights change petition also requires that State Board to determine whether the proposed change will cause unreasonable impacts to fish and wildlife, or to other public trust resources. It requires the State Board to find that the proposed change is in the public interest. In addition, the Delta Reform Act of 2009 added special requirements to the State Board's consideration of the WaterFix petitions, including the need for the State Board to include "appropriate Delta flow criteria" if the State Board were to grant the petitions. The Hearing Officers set these issues up as Part 2 of the hearing. Needless to say, CSPA participated in Part 2 of the hearing.

Each Part of the hearing consisted of three sub-parts. First, each party to the hearing that so desired presented a written "case-in-chief," consisting of written testimony by expert and other witnesses and supporting exhibits. In sequence, each witness summarized his or her testimony orally, and was then cross-examined by an attorney or other person representing each of the parties who wished to conduct cross-examination. Once each case-in-chief witness for each participating party presented testimony and stood for cross, the case-in-chief for Part 1 concluded. The hearing then moved to Part 1 rebuttal, where parties had the right to present witnesses to rebut (contradict) testimony presented in Part 1 cases-in-chief. Once oral summary and cross-examination for rebuttal concluded, the hearing moved to "sur-rebuttal," or rebuttal of Part 1 rebuttal testimony.

Following the conclusion of Part 1 on July 17, 2017, parties had the opportunity to submit a closing brief, or summary of its legal and factual arguments. Most entities, including CSPA, elected to wait to brief Part 1 issues in a single brief, together with Part 2 issues.

Part 2 hearings began on February 8, 2018, and followed the same sequence as Part 1: cases-in-chief, rebuttal, and sur-rebuttal. Sur-rebuttal for Part 2 concluded on October 1, 2018.

The summary above does not convey the dozens of written procedural motions, objections to testimony, and updates to exhibit lists that peppered the inboxes of all the people on the WaterFix service list throughout the proceeding.

In CSPA's testimony in Part 1 of the hearing, CSPA's Executive Director Bill Jennings provided testimony on water quality, adaptive management, modeling of water quality and quantity, and the process for balancing beneficial uses of water. Water Quality expert Dr. G. Fred Lee testified on impacts to water quality that WaterFix would have by reducing fresh water inflow from the Sacramento River to specific points in the central Delta. Consulting biologist Tom Cannon testified that the inadequacy of existing flow and water quality protections in the Delta requires the State Board to evaluate WaterFix under more stringent requirements. Water Rights Advocate Chris Shutes testified on existing and likely future reservoir operations, the irregularities of DWR and the Bureau's use of their water rights, how modeling reservoir operations does not create a requirement to carry out those operations in practice, and that the WaterFix project description lacked essential elements that obstructed clear analysis. CSPA's Part 1 rebuttal witness, former State Board member and attorney Marc Del Piero, testified that implementation of WaterFix would create a new water right, injure other legal users of water, and could not rely on compliance with existing water quality standards to prove lack of injury. (*The State Board's web page for all of CSPA's testimony and exhibits is [here](#). Be sure to scroll down.*)

For Part 2 of the hearing, CSPA provided ten witnesses.

Bill Jennings discussed the disastrous decline of Delta and upstream fish species, particularly under the existing regulations that DWR and the Bureau propose as the benchmark for measuring WaterFix; the failure of the State Board to protect fish, both by inadequate rule and lack of enforcement; the failure of fish agencies to protect fish; the failure of adaptive management to protect fish; the need for the State Board to apply what it knows to require

flows that will protect fish; and the need for the State Board to show its work in a formal balancing of the public trust with other uses of water.

Tom Cannon analyzed broad and specific impacts of WaterFix on fish in the Delta and upstream of the Delta. Tom's analysis went species by species, season by season, water year type by water year type, and location by location.

Chris Shutes discussed the importance and the results of the State Board's 2010 Delta Flow Criteria Report and presented some of the supporting documents submitted by fish agencies during the proceeding that led up to that report (since none of the fish agencies were parties to the WaterFix hearing). He also proposed carryover storage requirements for each of DWR and the Bureau's major reservoirs north of the Delta (Trinity, Shasta, Oroville and Folsom). He emphasized the need for the State Board to include enforceable conditions in any permits it might issue for WaterFix, in contrast to conditions that rely on adaptive management or on processes implemented by entities other than the State Board.

Marc Del Piero testified that the State Board needs to conduct a formal public trust balancing for the WaterFix project, similar to the process the State Board used in the Mono Lake decision when Marc was on the State Board. He testified that WaterFix is not in the public interest, is a request for a new water right, and has not adequately identified the source of water that the tunnels would divert. He also stated that DWR conflated the legal standard for "injury" under the water code with the CEQA standard for identifying and mitigating impacts.

Felix Smith, biologist and advocate formerly with the U.S. Fish and Wildlife Service, discussed the State Board's procedural responsibilities under the Public Trust Doctrine and substantive responsibilities to protect Delta fisheries.

Witnesses Jerry Neuburger, Dave Hurley, Dan Bacher, and Dr. Dave Fries each testified on the effects WaterFix would have on recreation and the Delta's recreation economy.

Witness Tom Stokely testified on the effects WaterFix would have on Trinity Reservoir and the Trinity River, on the operation and fisheries of the Sacramento River downstream of Shasta Dam, and on how WaterFix would perpetuate the irrigation of the west side of the San Joaquin Valley, whose runoff pollutes the Delta.

In Part 2 rebuttal, Tom Cannon provided testimony to contest the claims of DWR's fisheries witnesses on the alleged benefits WaterFix would have for fish. Dave Fries contested DWR's testimony on impacts to birds, recreation, barge traffic, and transportation. Chris Shutes presented a series of draft proposed permit terms for WaterFix should the State Board grant DWR and the Bureau's petitions. In part, these permit terms rebutted DWR's presumption throughout the hearing that compliance with current Delta water quality and flow requirements would make WaterFix "reasonably protective" of fish. It also included conditions that existing State Board regulations don't even address, like carryover storage in reservoirs. Finally, it recommended stricter requirements related to the proposed new North Delta Diversion, like higher flow requirements.

CSPA's attorney Mike Jackson was present at the vast majority of the 104 hearing days. He cross-examined dozens of witnesses, raised objections, made motions, and represented CSPA witnesses as they made oral summaries and stood for cross-examination. CSPA's Chris Shutes also cross-examined witnesses for DWR, the Bureau, and other parties. CSPA and Deirdre Des Jardins with California Water Research were physically present at far more hearing days than representatives for any other environmental or fishing groups.

Potential changes to the project that could require additional environmental review and/or days of hearing are changes in the level of participation of the Bureau of Reclamation in the project and a major reconfiguration of the project, such as reducing the project to a single tunnel. Otherwise, CSPA expects that once DWR certifies its supplemental EIR and the Bureau issues its final EIS, the Hearing Officers will issue a ruling concerning the length and due date for closing briefs that summarize each party's legal and factual arguments about the project, the hearing, and the testimony. After more than three arduous years and hundreds of thousands of pages of documents, this should be the final step before a decision by the State Board.

CSPA is deeply appreciative of the efforts of all the people who contributed to the enormous efforts of CSPA and its allies the WaterFix hearings, especially witnesses for CSPA and its Group 31 partners C-WIN and AquAlliance. We also extend our heartfelt thanks to all the people from other parties who worked with CSPA throughout the hearing. CSPA is extremely grateful to all these hearing participants for their hard work, their perseverance, their competence, and their generosity.

